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81-32
No.

IN THE
Supreme Court of the United States
October Term, 1980

Mosher Steel Company, Petitioner,

V.

Raymond J. Donovan, Secretary of Labor, Et Al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a United States District Court have jurisdiction to determine the constitutionality of a search warrant issued by its own magistrate, or must the District Court defer to the review of the Occupational Safety and Health Review Commission, an executive branch agency, on these constitutional warrant issues?

2. May inspectors from the Occupational Safety and Health Administration, United States Department of Labor, compel an inspection of an employer's plant under the Occupational Safety and Health Act, 29 USC §651, *et seq*, by physical force pursuant to an invalid warrant, even though such force is prohibited by OSHA regulations, and then require the employer to "exhaust administrative remedies" and litigate the constitutionality of the magistrate's warrant before the Occupational Safety and Health Review Commission?

3. If exhaustion on these constitutional warrant questions is required, what remedy does an employer have against unconstitutional, harassing OSHA inspections if the Secretary of Labor elects not to initiate any administrative citation proceedings and thus precludes any review of his own actions either by the OSHA Review Commission or the United States Court of Appeals under 29 USC §660?

PARTIES TO PROCEEDING IN COURT BELOW

The proceeding in the Fifth Circuit Court of Appeals involved two cases, *Baldwin Metals Company, Inc. v. Secretary of Labor and the Occupational Safety and Health Review Commission,* No. 79-2548, appealed by the Secretary from the United States District Court for the Northern District of Texas, and *Mosher Steel Company v. Secretary of Labor, et al,* No. 79-2870, appealed by the Secretary from the United States District Court for the Western District of Texas. The two cases were combined for argument and opinion by the Fifth Circuit. Baldwin Metals Company, Inc. is not a party to this petition for certiorari. In the *Mosher* case below the plaintiff was Mosher Steel Company. The Defendants were the Secretary of Labor, the Assistant Secretary of Labor for Occupational Safety and Health and the Occupational Safety and Health Administration of the United States Department of Labor, and its Compliance Officers Walter B. Cunningham, Edward Carvajal and Charles McGlothlin, and its Acting Area Director William T. Mace, and the Occupational Safety and Health Review Commission.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS THE WRIT SHOULD BE GRANTED 10

CONCLUSION 14

APPENDIX:

Opinion of the Fifth Circuit Court of Appeals, dated April 13, 1981 ..... 1a

Order of the United States District Court for the Western District of Texas, dated June 6, 1979 ..... 2a

Judgment of the United States District Court for the Western District of Texas, dated August 6, 1979 ..... 20a

Judgment of the Fifth Circuit Court of Appeals, dated April 13, 1981 ..... 24a

Order Denying Rehearing by Fifth Circuit Court of Appeals, dated May 13, 1981 ..... 26a

TABLE OF AUTHORITIES

Cases:	*Page*
Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979)	11, 12
Baldwin Metals Co., Inc. v. Secretary of Labor and Occupational Safety and Health Review Commission, CCH OSHD ¶23,599 (ND Tex. 1979)	*passim*
B.B. Andersen Construction Company, Inc. v. Donovan, et al No. 81-1134, U.S. District Court for District of Kansas (1981)	13
Cerro Metal Products v. Marshall, 620 F.2d 964 (3rd Cir. 1980)	7
Chromalloy American Corporation, 7 BNA OSHC 1547 (1979)	8
Electrocast Steel Foundry, 6 BNA OSHC 1562 (1978)	8
Eliason Corporation v. C. Patrick Babcock, et al, No. A792-00-796A2, Michigan Circuit Court (1981)	13
Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974); Cert denied 420 US 927 (1975)	9
In the Matter of the Establishment Inspection of Gilbert & Bennett Manufacturing Company, 589 F.2d 1335 (7th Cir. 1979)	12
In the Matter of the Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978)	12

In the Matter of the Establishment Inspection of Urick Property,
472 F.Supp. 1192 (WD Pa. 1979) 12

Marshall v. Barlow's, Inc.,
436 US 307 (1978) 7,10,12

Marshall v. Horn Seed Company,
____ F.2d ____, 9 BNA OSHC 1512 (10th Cir. 1981) 7,13

Marshall v. Huffhines Steel Company, Inc.,
488 F.Supp. 995 (ND Tex. 1979) 13

Marshall v. North American Car Company,
626 F.2d 320 (3rd Cir. 1980) 7

Marshall v. W & W Steel Company,
604 F.2d 1322 (10th Cir. 1979) 13

Marshall v. Weyerhaeuser Co.,
456 F.Supp. 474 (D NJ. 1978) 12

McKart v. United States,
395 US 185 (1969) 13

Michigan v. Tyler,
436 US 499 (1978) 7

Mosher Steel Company v. Marshall, et al,
CCH OSHD ¶23,630 (WD Tex. 1979) ..... *passim*

Muskrat v. United States,
219 US 346 (1911) 8

Sarasota Concrete Company,
9 BNA OSHC 1608 (1981) 14

United States ex rel Accardi v. Shaughnessy,
347 US 260 (1954) 7

United States v. Nixon,
418 US 683 (1974) 7

Weyerhaeuser v. Marshall,
592 F.2d 373 (7th Cir. 1979) 11

Constitution, Statutes, and Regulations:

U.S. CONST. Amend. IV 1

U.S. CONST. Amend. V 3

29 USC §657(f)(1) 2,5

29 USC §660 12

29 USC §666(h) 9

18 USC §111 9

18 USC §1114 9

29 CFR §1903.11 5

OSHA Field Operations Manual, Ch. V D(9), CCH ESHG ¶4330.4 2,6

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals (See, App, infra) is not yet officially reported. It is unofficially reported at 9 BNA OSHC 1568 and CCH OSHD ¶25,325. The judgment of the United States District Court for the Western District of Texas is not officially reported; however, it is unofficially reported at 1979 CCH OSHD ¶23,630.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals was rendered on April 13, 1981. On April 23, 1981, Mosher Steel Company filed its Petition For Rehearing and such petition was denied on May 13, 1981. On May 18, 1981, Mosher moved for a Stay Of Mandate and Mandate has been stayed pending Mosher's petition for certiorari. The jurisdiction of this Court rests on 28 USC §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment, U.S.C.A. Const. Amend. IV, provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The inspection in this case was purportedly conducted under Section 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 USC §657(f)(1), which provides:

> "(f)(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination."

The Secretary of Labor's written guidelines to his compliance officers concerning inspections by force even pursuant to a warrant are set forth at Chapter V D.(9) of the OSHA Field Operations Manual, CCH ESHG ¶4330.4:

> "(9) Refused entry or interference with a compulsory process.

No force shall be used by the CSHO [Compliance Safety and Health Officer] seeking entry or completion of the inspection. But the facts of such refusal or interference shall immediately be reported to the AD [Area Director] and Regional Solicitor by telephone, and followed up with a written memorandum through the Area Director within 24 hours thereafter. The Regional Solicitor will then take necessary court action for unlawful resistance to the compulsory process. The CSHO should make notations as to all witnesses to the refusal or partial refusal, and otherwise fully report all the facts surrounding such refusal."

The guaranty of due process of law is set forth in the Fifth Amendment, U.S.C.A. Const. Amend. V.:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 22, 1978, a United Steelworkers Staff representative filed a complaint with the Occupational Safety and Health Administration (OSHA), United States Department of Labor, alleging certain unsafe working conditions in Mosher Steel Company's San Antonio,

Texas plant.[1] On that same date, an OSHA compliance officer appeared at Mosher's San Antonio facility to conduct an inspection based on the union's complaint. However, the compliance officer indicated his inspection would not be limited to the complained of items, but would be a general, or "wall-to-wall" inspection.

Mosher's representatives expressed their belief to the compliance officer that the complaint was harassment, and was the fulfillment of union efforts to gain leverage at the bargaining table. Mosher therefore requested that a warrant be obtained in order to see the sufficiency of the evidence establishing the basis for the complaint.

Nearly three months later, on November 8, 1978, OSHA allegedly received another complaint from an unidentified "confidential source" over the telephone. Nineteen days after that, on November 27, 1978, two OSHA compliance officers appeared at Mosher's San Antonio plant and presented to Mosher's representatives an Inspection Warrant issued by the United States Magistrate for the Western District of Texas. The warrant had been requested and issued *ex parte*. There was no affidavit attached to the warrant, and the warrant itself did not specify the probable cause for its issuance.

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[1] There is no dispute that the union's complaint was an attempt to use OSHA to harass Mosher and gain leverage at the bargaining table. Mosher has been subjected to an inordinate number of inspections predicated on "complaints" from union representatives. Affidavits filed with the District Court reveal that the union has admitted that such complaints were and are made to pressure Mosher to agree to the union's contract demands.

In the summer of 1978, Mosher was again engaged in contract negotiations with the union. No agreement on the terms of a collective bargaining agreement was reached. One of the union representatives indicated Mosher could expect some more "complaints" to OSHA. This complaint followed shortly thereafter.

When Mosher's representatives attempted to determine the reason for this latest inspection, they were told there had been an employee complaint. However, the compliance officers had not presented Mosher with written notice of such employee complaint, as required by law,[2] and the Inspection Warrant itself was not limited to any "complained of" alleged safety hazards.

In short, Mosher was unable to determine whether proper procedures had been followed for the issuance of the Inspection Warrant or the reason for its issuance. Mosher was also unable to determine the scope of the inspector's authority and the search to be conducted -- except that it seemed to be unlimited.

Under these circumstances -- and believing these continuous, harassing OSHA inspections were predicated on unfounded union complaints -- Mosher determined to seek a hearing on the validity of the inspection warrant. Mosher therefore advised the compliance officers that entry would not be permitted pursuant to the warrant at that time.

However, before Mosher could file a motion to quash the warrant or take any other action, the two OSHA compliance officers arranged to be accompanied by a deputy United States Marshal and returned on November 29, 1978, presented the same inspection warrant, and stated their intention to gain entry by physical force if necessary.

At that time Mosher contacted its local counsel, Mr. Ben Foster, Jr., who shortly thereafter arrived at the plant. Mr. Foster attempted to determine the cause for the inspection but the OSHA compliance officers would give no explanation. Neither would they agree to limit their inspection in any way. Mr. Foster thereupon advised the compliance officers and the deputy United States Marshal

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[2] 29 USC §657(f)(1), 29 CFR §1903.11. The agency has a special OSHA-7 Form used for this purpose.

of his belief that the warrant was unconstitutional and illegal, and requested that OSHA abide by its own regulations[3] and seek enforcement of its warrant through established court procedures, so that Mosher would be afforded a hearing prior to the invasion of its Fourth Amendment rights.

The OSHA compliance officers refused Mosher's request that they abide by their own rules and regulations and proceeded with the inspection of Mosher's premises. Mosher's representatives strongly protested this invasion of Mosher's constitutional rights; and in fact, Mosher's plant manager was physically pushed aside from the entranceway of the plant by the Marshal.

In accordance with said search warrant, under Mosher's strong protests, the OSHA compliance officers conducted an exhaustive three day search of Mosher's entire San Antonio facility, its structures, machines, apparatus, equipment, materials, records, files, papers and other items they in their own discretion deemed pertinent to the investigation. Indeed, when one of Mosher's representatives commented he had never seen such a comprehensive search, the compliance officers indicated their intent to "make an example" of Mosher because of the company's insistence on a legal search warrant. Subsequently, on December 4, 1978, the compliance officers conducted a closing conference and informed Mosher of their intent to issue citations based upon evidence illegally obtained through their wall-to-wall search.

Shortly, thereafter, on December 22, 1978, before it had received any citations from OSHA, Mosher filed its complaint in the United States District Court for the Western

[3] The *OSHA Field Operations Manual* consists of compliance guidelines for the Occupational Safety and Health Act promulgated by the United States Department of Labor. Chapter V, D.(9) prohibits compliance officers from seeking entry by force *even with a warrant.* Instead it directs the Regional Solicitor to "take necessary court action for unlawful resistance to the compulsory process."

District of Texas pursuant to 28 USC §§1331, 1337, 1346, 1361 and 2201 and under Articles IV and V of the Amendments of the United States Constitution, seeking declaratory judgment that the inspection warrant issued against it was unconstitutional and null and void in violation of the Fourth Amendment, because an anonymous telephone complaint does not constitute sufficient probable cause even under *Marshall v. Barlow's, Inc.*, 436 US 307 (1978), and because the warrant was not properly limited to the complaint items and was therefore unconstitutionally overbroad in scope under *Michigan v. Tyler*, 436 US 499 (1978).[4]

Mosher further sought declaratory judgment that OSHA violated Mosher's Fifth Amendment due process rights by obtaining such warrant *ex parte* at a time when OSHA regulations required notice and hearing to the business operator,[5] and by compelling an inspection by physical force in contravention of OSHA's own regulations.[6] Mosher's complaint therefore requested that any information or evidence thus illegally obtained be suppressed, that the warrant be quashed and that the Court enjoin any further action by OSHA on the citations and proposed penalties which might be based upon evidence obtained in such illegal and unconstitutional search.

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[4] Subsequent decisions of the Circuit Courts of Appeals have agreed that an anonymous complaint does not constitute sufficient probable cause, see *Marshall v. Horn Seed Company, Inc.*, ____ F.2d ____, 9 BNA OSHC 1512 (10th Cir. 1981) and that an inspection based on a complaint must be limited in scope to the complained of items. See, *Marshall v. North American Car Company*, 626 F.2d 320 (3rd Cir. 1980). It is simply beyond dispute that the warrant in this case was invalid.

[5] As this Court observed in *Marshall v. Barlow's, Inc.*, 436 US at 317-318. See also *Cerro Metal Products v. Marshall*, 620 F.2d 964 (3rd Cir. 1980).

[6] This Court has repeatedly held that an agency is bound by its own published rules and regulations. See, *United States v. Nixon*, 418 US 683, 695-696 (1974), *United States* ex rel *Accardi v. Shaughnessy*, 347 US 260 (1954).

Both the Secretary of Labor and the Occupational Safety and Health Review Commission filed motions to dismiss the complaint, alleging that the District Court had no jurisdiction to review its own magistrate's probable cause determination, and arguing that since the warrant had already been executed Mosher must exhaust its administrative remedies, even as to the constitutional sufficiency of the warrant. Additionally, the OSHA Review Commission contended that *it* had the authority to determine whether the magistrate had acted in a constitutional manner in issuing the search warrant -- and to quash the magistrate's warrant if necessary.[7]

Mosher moved for summary judgment on the legal question of the constitutionality of the warrant and search.

After full briefing and argument, the District Court on June 6, 1979, denied OSHA's motions to dismiss and held that it had jurisdiction to review the actions of its own magistrate in issuing the warrant, and whether the warrant met the constitutional requirements of the Fourth Amendment. In so ruling, the District Court *ipso facto* held that the purposes behind the exhaustion doctrine were not present in this case. The District Court also granted Mosher's

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[7] Prior to this case the OSHA Review Commission recognized "that it is not within our authority to rule on the validity of a search warrant issued by a U.S. Magistrate. The Commission is a creature of the Congress and may proceed only in accordance with its delegated powers, which do not include authority to review the actions of a U.S. Magistrate. *Electrocast Steel Foundry, Inc.*, 6 BNA OSHC 1562, 1563 (1978). However, beginning with this case, the Review Commission made an abrupt about-face and now maintains that it *does* have the power to review the decisions of the United States District Courts. This newly-formulated position of the Review Commission is set forth in its July 17, 1979 decision in *Chromalloy American Corporation*, 7 BNA OSHC 1547 (1979). Mosher believes that this assumption of pure judicial authority by the Review Commission violates the Constitution's mandate of separation of powers. See, *Muskrat v. United States*, 219 US 346, 353 (1911).

motion for summary judgment that the warrant and inspection were illegal and for injunctive relief.

The Secretary of Labor filed notice of appeal to the Fifth Circuit Court of Appeals on August 2, 1979.[8]

In its April 13, 1981 decision the Fifth Circuit vacated and remanded to the District Court with instructions to dismiss. The Fifth Circuit held that Mosher was required to exhaust its administrative remedies, even under the circumstances of this case, and that the District Court should not have exercised jurisdiction. The Fifth Circuit also held that the District Court could not even exercise "equitable jurisdiction under *Hunsucker v. Phinney,* 497 F 2d 29 (5th Cir. 1974), Cert. denied 420 US 927 (1975) because there had been no callous disregard by OSHA officials for the constitutional rights of the company.

Mosher petitioned the Fifth Circuit for rehearing, pointing out, *inter alia,* that the Court's statement that there was no evidence of "a callous disregard by OSHA officials for the constitutional rights" of Mosher was clearly incorrect. Mosher pointed out that the undisputed facts revealed that OSHA regulations prohibit entry by force, even with a warrant; that the OSHA officials had been specifically directed and requested to comply with such regulations; that Mosher had taken every possible action to dishonor the warrant and prevent the inspection short of arrest and possible imprisonment[9] in order to protect its rights, even at the risk of being held in contempt; and that the OSHA officials had deliberately disregarded Mosher's plea and entered Mosher's plant by force in knowing and intentional violation of OSHA's own regulations. Consequently, even apart from the Fourth Amendment issues,

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[8] Although a defendant in the District Court, the Occupational Safety and Health Review Commission did not join in the appeal.

[9] See 18 USC §111, 1114 and note to 29 USC §666(h) for a description of the criminal penalties for forcibly interfering with an OSHA compliance officer.

the search of Mosher's plant *did* present a clear and unambiguous violation of Mosher's rights to due process and equal protection of the laws under the Fifth Amendment to the United States Constitution, and the District Court's exercise of jurisdiction was proper on that ground alone.

Nevertheless, Mosher's petition for rehearing was denied on May 13, 1981, and the company now petitions this Court to grant certiorari. Significantly, in the meantime, in the companion *Baldwin Metals* case, OSHA withdrew its original citations, *which means that that company now has no administrative remedies to exhaust* and thus has *no means* by which it can secure a judicial determination that its rights were violated and prohibiting OSHA from such conduct in the future.

REASONS THE WRIT SHOULD BE GRANTED

PRELIMINARY STATEMENT

In 1978 this Court confirmed in *Marshall v. Barlow's, Inc.*, 436 US 307, that the Fourth Amendment requires a warrant to conduct nonconsensual OSHA inspections. After the *Barlow's* decision OSHA took the position that the only probable cause showing required for an administrative inspection warrant was the agency's determination that reasonable grounds to believe a violation of the Act existed, and that the magistrate could not question the agency's decision to search.[10] Unfortunately, many United States Magistrates routinely issued OSHA's boilerplate form inspection warrants without questioning either the agency's decision to inspect a particular

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[10] Indeed, in its brief to the District Court below, OSHA makes the incredible statement that "the Secretary's determination to respond to a complaint is not and should not be reviewable by a magistrate." See Memorandum In Opposition To Plaintiff's Complaint And In Support Of Defendant's Motion To Dismiss, p. 19 at n. 19.

employer, or the scope of the proposed inspection. As a result, a large number of cases have arisen in both federal and state courts concerning constitutional challenges to OSHA warrants.

These courts have been divided on the proper procedure by which an employer may challenge the constitutionality of an OSHA warrant. Some, such as the Seventh Circuit in *Weyerhaeuser v. Marshall,* 592 F 2d 373 (7th Cir. 1979) have held that the District Court has inherent jurisdiction to review the constitutionality of its own magistrate's warrant, either before or after it is executed, and reasoned that the purposes of the exhaustion doctrine are not present where a warrant is challenged on constitutional grounds.

Other courts, such as the Third Circuit in *Babcock & Wilcox Co. v. Marshall,* 610 F 2d 1128 (3rd Cir. 1979), have held that if the employer allows the warrant to be executed, then exhaustion is required and the OSHA Review Commission may rule on the constitutionality of the magistrate's search warrant. According to these decisions, the only means by which an employer can litigate the validity of the warrant in the district court in the first instance is to refuse entry and defend in a subsequent contempt proceeding. The Fifth Circuit below followed this latter line of cases.

However, neither the Fifth Circuit nor any other court has addressed the critical issues presented by the facts in this case:

(1) What is the employer's remedy if, as here, OSHA enters by force, and denies the employer even the opportunity to risk contempt in order to gain a hearing on the warrant before the district court?

(2) What is the employer's remedy if OSHA learns of the company's intent to contest the warrant after it is

executed and thus never initiates an administrative proceeding?[11]

The effect of the Fifth Circuit's ruling is to place Mosher and the millions of other employers subject to OSHA at the complete mercy of OSHA, with no recourse to any court or administrative forum except as OSHA in its own discretion chooses. Under the Fifth Circuit's holding, OSHA may obtain a questionable warrant,[12] invade an employer's workplace by force, and then require the employer to litigate the validity of that warrant and search before the OSHA Review Commission. If, after the inspection, it appears that the employer does indeed intend to contest the validity of the warrant and search through the Review Commission and into the United States Court of Appeals, as provided by 29 USC §660, the Secretary

[11] In all likelihood the same thing that happened in the companion *Baldwin Metals* case will happen to Mosher if certiorari is not granted. Once the district court dismisses, pursuant to the Fifth Circuit's instructions, the Secretary, knowing the warrant here is invalid, will simply withdraw the citation and Mosher will have no administrative remedy to exhaust, and no avenue by which it can ultimately obtain judicial review of OSHA's actions in this case.

[12] In requiring exhaustion in *Babcock & Wilcox, supra,* the Third Circuit refused to indulge in the presumption "that magistrates do not perform their duties correctly and that there will not be probable cause for issuing inspection warrants in a fair number of these cases." 610 F.2d at 1136. The Court's reasoning is belied, however, by the plethora of OSHA warrant cases that have arisen in state and federal court since this Court's decision in *Barlow's.* The hard fact is that the lower court decisions on what constitutes probable cause for an OSHA warrant vary tremendously, so that the Secretary of Labor can find some precedent to support almost any warrant application. Cf., *In The Matter Of Establishment Inspection of Gilbert & Bennett Manufacturing Company,* 589 F.2d 1335 (7th Cir. 1979) with *Marshall v. Weyerhaeuser Co.,* 456 F.Supp. 474 (D NJ. 1978) and *In The Matter of Establishment Inspection of Northwest Airlines, Inc.,* 587 F.2d 12 (7th Cir. 1978). As noted in *In The Matter of Establishment Inspection of Urick Property,* 472 F.Supp. 1192, 1194 (WD Pa. 1979) there is an "embarrassment of riches from the District Courts on every conceivable objection that can be raised to OSHA inspections."

may simply decline to initiate any administrative proceedings and thus preclude *any* determination of the legality of the warrant or OSHA's actions. And six months later OSHA may return and do the same thing all over again.[13]

Review by this Court is therefore needed for the following reasons:

1. To resolve the conflict between decisions of the United States Courts of Appeals concerning whether the United States District Courts have jurisdiction to review the constitutionality of OSHA warrants issued by their own magistrates;

2. To resolve whether the purposes behind the judicially created doctrine of exhaustion of administrative remedies, as espoused by this Court in *McKart v. United States*, 395 US 185 (1969), are present where the constitutionality of an OSHA warrant issued by a United States District Court is challenged;

3. To resolve whether the OSHA Review Commission, an executive branch administrative agency, may

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[13] Due to the possibility that exhaustion may be required if the warrant is executed, more and more employers are refusing entry and risking contempt in order to gain a district court hearing on a questionable warrant. See, e.g., *Marshall v. Huffhines Steel Company, Inc.*, 488 F.Supp. 995 (ND Tex. 1979), *Marshall v. Horn Seed Company, Inc.*, ___ F.2d ___, 9 BNA OSHC 1510 (10th Cir. 1981), *Marshall v. W & W Steel Company, Inc.*, 604 F.2d 1322 (10th Cir. 1979). In response, OSHA has elected to compel entry by physical force rather than seek court enforcement of a questionable warrant --even though OSHA's own regulations prohibit such force. The present case is one example. Other pending cases where OSHA entered by force are *B.B. Andersen Construction Co., Inc. v. Donovan, et al*, No. 81-1134, U.S. District Court for the District of Kansas, and *Eliason Corporation v. C. Patrick Babcock, et al*, No. A792-00-796A2, Michigan Circuit Court (under Michigan State OSHA).

review the constitutional probable cause and scope of warrant determinations made by United States District Courts in issuing OSHA warrants;[14]

4. To resolve whether employers have a right to a judicial determination of the constitutionality of an OSHA warrant and search even if no administrative OSHA citations are issued;

5. To resolve whether an OSHA inspection pursuant to a civil administrative inspection warrant may be conducted by physical force, particularly where force is prohibited by OSHA regulations.

CONCLUSION

This case presents critical constitutional questions that affect the Fourth and Fifth Amendment rights of nearly six million employers. The claim of the OSHA Review Commission that it can in effect grade the papers of the United States District Courts also presents a serious separation of powers issue. Only this Court can resolve the current uncertainty as to OSHA's authority, employers' rights, and the jurisdiction of the United States District

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[14] The most recent case in which the OSHA Review Commission has reviewed these constitutional warrant questions is *Sarasota Concrete Company*, 9 BNA OSHC 1608 (1981).

Courts presented by the facts in this case. Petitioner therefore prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to all Counsel of Record this 6th day of July, 1981.

Robert E Rader Jr
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APPENDIX

APPENDIX A

Opinion of U.S.C.A.—5th Circuit

United States Court Of Appeals, Fifth Circuit

BALDWIN METALS COMPANY, INC.,
Plaintiff-Appellee,

v.

Raymond J. DONOVAN, Secretary of Labor, Etc., and Occupational Safety and Health Review Commission, Defendants-Appellants.

MOSHER STEEL COMPANY, a Division of Trinity Industries,
Plaintiff-Appellee,

v.

Raymond J. DONOVAN, Secretary of Labor et al., Defendants-Appellants.

Nos. 79-2548, 79-2870.

United States Court of Appeals,
Fifth Circuit
Unit A

April 13, 1981.

Employers brought actions challenging validity of Occupational Safety and Health Administration search warrants. The United States District Court for the Northern District of Texas, Robert W. Porter J., and the United States District Court for the Western District of Texas, Adrian A. Spears, J., entered judgments, and appeals

were taken. After consolidation, the Court of Appeals, Goldberg, Circuit Judge, held that: (1) judicial review of allegedly unconstitutional OSHA search warrants provided by appellate review of Occupational Safety and Health Review Commission decisions by Court of Appeals precluded subject employers from suffering irreparable injury, and thus judicial review of the warrants, which were issued after Commission proceedings had been initiated, had to be postponed until employers exhausted administrative remedies, and (2) it was improper for district courts to exercise equitable jurisdiction to hear employers' challenges to validity of the search warrants where employers failed to show irreparable injury, callous disregard of constitutional rights by OSHA officials, and absence of adequate remedy at law.

Vacated and remanded.

Appeals from the United States District Court for the Northern District of Texas.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, POLITZ AND SAM D. JOHNSON, Circuit Judges.

GOLDBERG, Circuit Judge:

In *Marshall v. Barlows, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Supreme Cartographer placed us on the Constitutional highway governing the validity of search warrants issued for OSHA[1] investigations. Although this is the Fifth Circuit's first trip along

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[1] Occupational Safety and Health Administration.

this road, possible routes and destinations have been mapped out by four of our sister circuits.[2] Because we believe that the geodetics proposed by the First, Third and Eighth Circuits provide the better approaches, we now number ourselves among the mapmakers sanctioning these routes.

I. Beginning The Journey: Checking the Rearview Mirror

Prior to 1978, it was thought that section 8(a) of the Occupational Safety and Health Act of 1970[3] authorized warrantless searches by OSHA officials. *Secretary of Labor v. Chromalloy American Corp.*, OSHRC No. 77-2788, 7 OSHC (BNA) 1547 (Rev. Comm'n July 17, 1979). Problems associated with reviewing the validity of OSHA search warrants never arose, since there was no need to obtain a warrant in order to conduct an OSHA search. However, once the Supreme Court in *Barlows, supra,* held that the authorization of warrantless OSHA searches was unconstitutional, the courts were forced to decide when and where challenges to the OSHA search warrants were to be litigated.

The problem of reviewing the validity of OSHA search warrants was especially troublesome when Occupational Safety and Health Review Commission (OSHRC) proceedings had already been initiated. In such cases, tension was created between district court review of federal magistrates and the time-honored doctrine of exhaustion of administrative remedies. Since the warrants are issued by federal magistrates, and since review of magistrates' decisions is ordinarily entrusted to the district court,[4] the federal district courthouse would seem to be the best place

[2] Compare *Babcock & Wilcox Co. v. Marshall,* 610 F.2d 1128 (3d Cir. 1979) and *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719 (8th Cir. 1979) and In re *Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611 (1st Cir. 1979) with *Weyerhaeuser Co. v. Marshall,* 592 F.2d 373 (7th Cir. 1979).

[3] 29 U.S.C.A. § 657(a) (West 1975).

[4] See *Weyerhaeuser, supra,* 592 F.2d at 377; *Bruno v. Hamilton,* 521 F.2d 114, 116 (8th Cir. 1975).

to litigate the validity of OSHA warrants. However, once the administrative process has begun, the exhaustion of administrative remedies doctrine would preclude judicial review until a final agency decision is rendered. Since OSHRC decisions are directly appealable to the circuit courts of appeals, judicial review of a warrant's validity would not take place until the appellate stage, thereby totally bypassing district court review of the magistrate's decision to issue a warrant. With these conflicting policies and rules of law in mind, we begin our journey through the OSHA enforcement process.

II. A Drive Through Baldwin Metals and Mosher Steel

The consolidated appeals before us present strikingly similar cases in which the pertinent facts are virtually undisputed. No. 79-2548 involves Baldwin Metals Co. ("Baldwin") of Dallas, Texas. In November 1978, OSHA officials attempted to investigate safety conditions at Baldwin's plant and were refused admission. They subsequently applied for and were granted an inspection warrant issued by a United States Magistrate for the Northern District of Texas. The OSHA officials returned to the plant armed with the warrant and were allowed to enter.[3] Based upon the evidence uncovered during the search, OSHA citations were issued against Baldwin in January 1979. Baldwin subsequently filed a complaint in district court seeking a declaration that the warrant was unconstitutional, an order suppressing the use of any evidence obtained pursuant to the warrant, and an injunction prohibiting OSHA from taking further action based on the allegedly unconstitutional search. In addition, in order to prevent any immediate OSHA action, Baldwin

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[3] Baldwin claims that its representatives "strongly protested this invasion of Baldwin's constitutional rights and allowed the compliance officers to enter only because of the threatened contempt action against Baldwin." Brief for Appellee at 3.

asked for a preliminary injunction seeking essentially the same relief. The district court granted the preliminary injunction and this appeal followed.

No. 79-2870 involves Mosher Steel Co. ("Mosher") and its plant in San Antonio, Texas. On November 27, 1978, OSHA officials, having already obtained an inspection warrant, attempted to search Mosher's plant but were not permitted entry. Two days later the officials returned, and were allowed to enter over the protests of Mosher's representatives.[6] The officials conducted a search of the premises, and issued citations based on the evidence seized during the search. Mosher filed a complaint in federal district court seeking a declaration that the warrant was unconstitutional, an order suppressing the use of any evidence obtained pursuant to the warrant, and an injunction prohibiting OSHA from taking further action based on the allegedly unconstitutional search. The district judge granted the declaratory and injunctive relief requested by Mosher, and this appeal followed.

The issue presented in both cases is whether a federal district court may properly declare an OSHA search warrant to be invalid, and may enjoin the use of evidence seized pursuant to the warrant, before a final administrative decision has been rendered. We now examine this issue, first in light of the exhaustion of remedies doctrine, and then in light of the exercise of equitable jurisdiction.

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[6] Mosher claims that the OSHA officials threatened to use physical force to gain entry, and actually pushed one employee aside from the plant entrance. Brief for Appellee at 5-6.

III. The First Stop Along The Road: Trouble With The Exhaust System

Any examination of the exhaustion of administrative remedies doctrine should begin with the classic pronunciation by the United States Supreme Court that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938); *see McClendon v. Jackson Television, Inc.*, 603 F.2d 1174 (5th Cir. 1979); In *re Restland Memorial Park*, 540 F.2d 626 (3d Cir. 1976); *Barnes v. Chatterton*, 515 F.2d 916 (3d Cir. 1975). However, the rule has numerous exceptions and exhaustion of remedies is not required in all circumstances. See, e.g., *Weyerhaeuser, supra; Cerro Metal Products v. Marshall*, 620 F.2d 964 (3d Cir. 1980); *Rhodes v. United States*, 574 F.2d 1179 (5th Cir. 1978); *American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310 (9th Cir. 1977). In the cases at bar we must thus determine whether the policies behind the exhaustion of remedies rule would be served by requiring exhaustion, and whether any exception to the exhaustion rule applies to the facts before us.

[1] The reasons for the exhaustion of administrative remedies doctrine include protecting administrative autonomy, deferring to agency expertise, facilitating judicial review through creation of a factual record by the agency, and conserving the time and energy of the courts since the judicial controversy may be mooted if the agency grants the relief sought. See *Dunn, supra*, 561 F.2d at 1314; *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860 (5th Cir. 1975). In a case similar to the ones at bar today, the Seventh Circuit held that because the reasons underlying the exhaustion doctrine did not fit the facts of the case before it, exhaustion of remedies was not required. *Weyerhaeuser, supra*, 592 F.2d at 376. Since the constitutional challenges in the cases at bar and in the Seventh Circuit's case all involve the facial

validity of a warrant, a factual record is not required for judicial review, and we agree with the Seventh Circuit's rejection of this rationale. Moreover, we agree with the Seventh Circuit's conclusion that interests of agency expertise do not require exhaustion, since agency officials have no special expertise which would make them adept at handling issues concerning the constitutional validity of warrants. However, we disagree with the determination that constitutional issues may not be mooted by an agency decision in favor of the allegedly aggrieved party, and we find that interests of administrative autonomy weigh in favor of requiring exhaustion of remedies in cases like the ones at bar. Therefore, we disagree with the conclusion of the Seventh Circuit, and we hold that the exhaustion of remedies rule applies to the present cases.

The Seventh Circuit found that there was no possibility of mooting the issue of the warrant's constitutionality, since if the warrant and subsequent search were unconstitutional, the fourth amendment injury would remain even if the citations were dismissed. Id. at 376. The court thus distinguished between the injury resulting from the citations and the injury resulting from the search, and held that while a favorable ruling by OSHRC might relieve the former, it could not affect the latter. However, the declaratory and injunctive relief sought in cases like the one before the Seventh Circuit and the ones at bar merely seeks to preclude administrative action based on the allegedly unconstitutional searches. If the OSHA citations against the administrative defendants are dismissed for any reason, the injunctive and declaratory relief sought in federal court would be of no value. Hence, while the alleged injury resulting from the search is indeed different than the alleged injury resulting from the citations, the relief sought in cases like the ones at bar concerns the latter.

Since the issue might therefore be mooted by dismissal of the citations in the administrative proceeding, the rationale behind the exhaustion of remedies doctrine applies.[7]

Applying this analysis to the cases at bar, it is clear that OSHRC decisions in favor of Baldwin and Mosher will moot the issues of the warrant's constitutionality. If the citations against Baldwin and Mosher are resolved in the companies' favor for any reason, there will be no need for declaratory and injunctive relief regarding the warrants. Indeed, if the OSHA citations pursuant to the warrants are dismissed, granting the declaratory and injunctive relief requested would serve no purpose other than to announce to the world that the searches conducted were unconstitutional.[8] See *Babcock & Wilcox, supra,* 610 F.2d at 1138.

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[7] The possibility of mooting constitutional issues by an agency decision favorable to the allegedly aggrieved party may alone be enough to require exhaustion of remedies. See *Public Utilities Commission of California v. United States,* 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 67 S.Ct. 1493, 91 L.Ed. 1796 (1947); *Moore v. City of E. Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 1948-49, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting).

[8] It is possible—though indeed unlikely—that even if the OSHA citations against Mosher and Baldwin were dismissed, the evidence from the allegedly illegal search would be used in a subsequent OSHA proceeding against one of the companies. This possibility does not change the result in this case, since if such a future proceeding was brought, a decision by the agency favorable to Mosher or Baldwin would again serve to moot the constitutional issue. Hence, exhaustion of administrative remedies would again be required.

Additionally, requiring exhaustion of remedies in the cases at bar would serve to protect the autonomy of OSHRC enforcement proceedings. Allowing the district courts to consider requests for declaratory and injunctive relief concerning OSHA warrants prior to a final administrative decision invites dilatory tactics by companies faced with an enforcement proceeding. See *Babcock & Wilcox, supra,* 610 F.2d at 1140; *Quality Products, supra,* 592 F.2d at 616; *infra,* slip op. page 5870, page . Requiring exhaustion of remedies thus prevents administrative defendants from throwing a wrench into the enforcement machinery.[9]

[2] Once it has been determined that there is a valid reason for applying the exhaustion of remedies doctrine, the exceptions to the rule must be considered. If resort to the prescribed administrative procedures would be futile or inadequate to prevent irreparable injury, or if blatant violations of constitutional or statutory rights have already occurred, the exhaustion of administrative remedies should not be required. *Rhodes v. United States,* 574 F.2d 1179 (5th Cir. 1978); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,* 619 F.2d 231 (3d Cir. 1980); *Barnes, supra,* 515 F.2d at 920-21. In the cases before us, the allegedly improper searches do not present "clear" or unambiguous" violations of constitutional or statutory rights, and so this exception to the exhaustion of remedies rule is inapplicable. Moreover, we are presented with no evidence that agency review before OSHRC would be futile, and so this exception is inapplicable as well. The only exception to the exhaustion doctrine which merits extended discussion in these cases is the

[9] "Were an employer given the power to invoke the district court's jurisdiction on the eve of a scheduled hearing before the Review Commission whenever an inspection warrant is challenged on constitutional grounds, we might well sunder the statutory balance between swift abatement of dangerous conditions and due process protections." *Babcock & Wilcox, supra,* 610 F.2d at 1140.

possibility that irreparable harm will result if the exhaustion of remedies requirement is applied. Appellees make two arguments in this regard.

First, Baldwin and Mosher argue that requiring exhaustion of remedies in these cases violates the separation of powers guaranteed by the Constitution. They suggest that allowing OSHRC to hear the case prior to any judicial hearing invites an executive agency Review Commission to make constitutional rulings on the warrant's validity and denies the companies their right to judicial review of constitutional issues. Appellees' argument ignores the appellate process by which OSHRC decisions are reviewed. The administrative defendants have the right to appeal adverse OSHRC rulings to the courts of appeals, and judicial review of constitutional issues—such as the validity of a warrant—may take place at this level.[10] See 29 U.S.C.A. § 660(a) (West 1975). No injury to defendants can occur, since review of the OSHRC decision will be heard by the same court of appeals which would have reviewed a federal district court's decision concerning the constitutionality of a warrant. See *Babcock & Wilcox, supra,* 610 F.2d at 1140. Hence, since judicial review of the warrant's constitutionality is guaranteed by the right to appeal adverse OSHRC rulings to a federal court of appeals, Baldwin and Mosher will suffer no irreparable injury by being required to exhaust administrative remedies

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[10] This bypasses the normal step of district court supervision of its magistrates' decisions to issue warrants, but this bypass is indeed a small price to pay in order to protect administrative autonomy and to create the possibility of making judicial intervention unnecessary if the OSHRC decides in favor of the defendants.

before bringing their claims to federal court.[11]

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[11] OSHRC believes that it is competent to address constitutional issues and to review the magistrate's decision to issue a warrant. See *Chromalloy American Corp., supra;* see, e.g., *Secretary of Labor v. Moulded Acoustical Products,* OSHRC No. 79-1274 (June 12, 1979). Our brethern of the Third Circuit choose to characterize this function in a different way, and suggest that the Review Commission must inevitably decide whether to consider seized evidence, and that this involves a judgment as to the warrant's propriety.

> [T]he decision to issue the inspection warrant is complete and cannot be negated. If the challenge (to the warrant's validity) is raised by (the administrative defendant), the problem for the Review Commission will be whether to use the evidence obtained from the inspection. In deciding whether to use this evidence the Review Commission must of course, makes (sic) its own judgment as to the propriety of the warrant, but such a determination does not reverse the magistrate's action, nor does it contravene a judicial order. The OSHA official would not be in contempt if he were to decide not to execute a warrant signed by the magistrate, and an administrative tribunal does not flout the authority of the judiciary by refusing to consider evidence that has been obtained pursuant to a warrant issued by a judge or magistrate.

Babcock & Wilcox, supra, 610 F.2d at 1136 (footnotes omitted). But see *Rader, Lewis & Ehlke, OSHA Warrants and the Exhaustion Doctrine:* May the Occupational Safety & Health Review Commission Rule on the Validity of Federal Court Warrants?, 84 Dick.L.Rev. 567 (1980); Note, Procedures for Attacking OSHA Inspection Warrants, 66 Va.L.Rev. 983 (1980). Since we hold that the appellate process adequately ensures judicial review of a warrant's constitutionality, and since we are not faced with a case in which the Review Commission has purported to make a constitutional decision, we do not reach this issue.

The second irreparable injury claimed by Baldwin and Mosher is that requiring exhaustion of remedies in the cases at bar would force them to defend against unconstitutionally seized evidence in the administrative proceeding. This argument is puzzling, since the irreparable injury from the search itself has already been accomplished and therefore cannot be avoided, and since any injury due to an erroneous admission by OSHRC of the allegedly unconstitutionally seized evidence can be "repaired" by judicial review of the OSHRC decision, and is therefore not "irreparable."[12] Appellees' argument seems to misconstrue the nature of a fourth amendment injury. The wrong is accomplished by the unconstitutional search itself; use of illegally seized evidence in future proceedings, subject to reversal on appeal, does not constitute a new injury. See *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 619-23, 38 L.Ed.2d 561 (1974); *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Babcock & Wilcox, supra,* 610 F.2d at 1134. Hence, appellees will not be irreparably harmed if they are forced to defend against unconstitutionally seized evidence, as long as judicial review of the alleged constitutional violation is available to ensure that the evidence will eventually be excluded if it is found to have been unconstitutionally obtained. Since such a review process is

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[12] The relief sought in the case at bar seeks to ensure exclusion of the seized evidence at pending or future proceedings. Requiring exhaustion of remedies does not jeopardize the exclusion of inadmissible evidence, since judicial review of admissibility will take place through the appeals process. Hence, any injury resulting from an erroneous admission of unconstitutional evidence by the Review Commission can be corrected by a federal court of appeals and is therefore not irreparable.

provided in the cases at bar, no irreparable injury can be found.[13]

As noted above, the Seventh Circuit has considered the exhaustion of remedies issue before us today, and has reached a result contrary to that reached here based on its conclusion that the rationale behind the exhaustion of remedies doctrine does not apply to this situation.[14] *Weyerhaeuser, supra;* see *Morris v. United States Department of Labor,* 439 F.Supp. 1014 (S.D.Ill.1977). However, shortly after the Seventh Circuit's decision in Weyerhaeuser, the Third Circuit issued its opinion in *Babcock & Wilcox Co. v. Marshall, supra,* 610 F.2d 1128, creating a split in the circuits and providing the route which we have followed in analyzing the exhaustion of remedies issue in the cases at bar. The fact pattern in *Babcock & Wilcox* was quite similar to that in the cases before us today, and the Third Circuit held that exhaustion of administrative remedies was required before a federal court could consider constitutional claims regarding administrative inspection warrants. Having considered the analyses of both the Seventh and Third Circuits, we have concluded that the latter provides the better approach for the reasons detailed above.

In the cases at bar, we find no reason to excuse Baldwin Metals or Mosher Steel from the exhaustion of remedies requirement. An OSHRC decision favorable to Baldwin

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[13] This analysis applies only when the allegedly unconstitutional search has already taken place, since the irreparable harm from the search cannot be undone by enjoining the use of its fruits. However, if a federal court is asked to consider the validity of a warrant prior to its execution—in a contempt proceeding, for example—exhaustion of remedies will not be appropriate, since the irreparable harm of the threatened unconstitutional search can be prevented prior to the warrant's execution. E.g., *Marshall v. Huffhines Steel Co.,* 488 F.Supp. 995 (N.D.Tex.1979); see *Babcock & Wilcox, supra,* 610 F.2d at 1136.

[14] See *supra,* slip op. pages 5866-5867, pages

or Mosher would moot constitutional issues and make judicial intervention unnecessary. In addition, requiring exhaustion of remedies serves to protect the autonomy of OSHRC proceedings. Moreover, since judicial review of the allegedly unconstitutional warrants is provided in the appellate review of OSHRC decisions by a federal circuit court of appeals, no irreparable injury is suffered. Based upon the above analysis and upon the Third Circuit's thoughtful opinion in *Babcock & Wilcox, supra,* we hold that judicial review of the administrative warrants in these cases should be postponed until Baldwin and Mosher have exhausted their administrative remedies.

IV. The Second Stop Along The Road: Adjusting The Alignment and Balance

[3-7] The principles controlling the exercise of equitable jurisdiction provide another basis upon which the district courts should have declined to hear the cases at bar. It is clear that a court must choose to exercise its equitable jurisdiction before it can consider the constitutionality of evidence in a proceeding other than that in which the evidence is to be used. *Hunsucker v. Phinney,* 497 F.2d 29, 32-33 (5th Cir. 1974), *cert. denied,* 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975). Before a court should exercise this equitable jurisdiction, it should carefully weigh the danger of an irreparable injury, the existence of a callous disregard of constitutional rights and the possibility of an inadequate remedy at law. Id. at 34 & n.7. As noted above, none of these criteria are satisfied in the case at bar.[15] We have been presented with no evidence of a callous disregard by OSHA officials for the constitutional rights of the companies. Moreover, there is no possibility of irreparable injuries resulting in the cases at bar, since the searches have already taken place, and since judicial review of the search warrants' constitutionality at the appellate level provides an adequate remedy at law.[16]

[15] See *supra,* slip op. pages 5868-5869, pages

[16] See 29 U.S.C.A. § 660(a) (West 1975).

Because the *Hunsucker* criteria are absent in this case, the district court should have refused to exercise its equitable jurisdiction.[17]

[17] The general principles controlling the grant of declaratory and injunctive relief provide insight into the rationale behind refraining from the exercise of equitable jurisdiction in cases like the ones at bar. An inadequate remedy at law and an irreparable injury should exist before a court grants injunctive relief. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 954, 3 L.Ed.2d 988 (1959); *Confederation of Police v. City of Chicago,* 481 F.Supp. 566, 569 (N.D.Ill. 1980); *International Association of Firefighters, Local 2069 v. City of Sylacauga,* 436 F.Supp. 482 (N.D.Ala. 1977). Since there is no danger of irreparable injury in the cases at bar due to the existence of an adequate remedy, see *supra,* injunctive relief should not have been granted. This requirement of an irreparable injury also applies to the grant of the preliminary injunction in Baldwin. See *Canal Authority of Florida v. Callaway,* 489 F.2d 567 (5th Cir. 1974); *Blackshear Residents Organization v. Romney,* 472 F.2d 1197 (5th Cir. 1973). In addition, while irreparable injury need not be shown in order to justify declaratory relief, *Diaz v. Stathis,* 576 F.2d 9 (1st Cir. 1978), the court must balance a plaintiff's need for the relief against the consequences of granting the remedy, and should only grant a declaratory judgment when it would be in the public interest to do so. See *Eccles v. Peoples Bank of Lakewood Village,* 333 U.S. 426, 68 S.Ct. 641, 644, 92 L.Ed. 784 (1948); *Exxon Corp. v. FTC,* 588 F.2d 895 (3d Cir. 1978). A declaratory judgment should only be granted when the issues are fit for judicial decision, and should not be used by the judiciary to interfere in agency proceedings before a final administrative decision has been rendered. See *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967); *Exxon Corp., supra; A.O. Smith Corp. v. FTC,* 530 F.2d 515 (3d Cir. 1976). Since Baldwin and Mosher have an adequate remedy available through OSHRC review and the appeals process, see *supra,* their need, for a declaratory judgment is slight. On the other hand, granting declaratory relief interrupts the agency proceedings and forces judicial consideration of constitutional issues which might be mooted by an administrative decision favorable to Baldwin or Mosher. See *supra,* slip op. pages 5866-5867, pages . Moreover, granting the relief requested might jeopardize the OSHA enforcement process by enabling the defendant companies to delay OSHRC proceedings. See *supra,* slip op. pages 5867-5868 & n.9, page & n.9. Hence, a declaratory judgment would not be in the public interest. Finally, the discussion of the exhaustion of administrative remedies doctrine, *supra,* slip op. pages 5866-5870,

[Footnote continued on next page]

Two recent decisions by the First[18] and Eighth[19] Circuits lend support to this analysis. Although the procedural context in both cases differs slightly from that in the cases before us today, the differences are unimportant,[20] and the analyses of these cases leads us to conclude that the district court's equitable jurisdiction should not have been exercised in the cases at bar.

In *Quality Products,* the First Circuit was faced with reviewing a motion in district court to quash an OSHA search warrant and to suppress its fruits after OSHRC proceedings were begun, but before a final administrative decision had been rendered. The court noted that the suppression of evidence would involve the exercise of equitable jurisdiction by the district court, and citing this court's decision in *Hunsucker, supra,* found that the balance of equities weighed against exercising jurisdiction. *Quality Products, supra,* 592 F.2d at 614-16. First of all, the court noted that the exercise of equitable jurisdiction would result in piecemeal adjudications and would encourage delay and waste since the district court action to quash the warrant and suppress the evidence was separate from the OSHRC proceeding. Id. at 614 & n.4. Moreover,

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[Footnote continued]
pages , makes it clear that the issues in the case are not yet fit for judicial review. See also *Imperial Carpet Mills v. Consumer Products Safety Commission,* 634 F.2d 871 (5th Cir. 1981). Thus the declaratory and injunctive relief sought in the cases at bar should not have been granted.

[18] In re *Worksite Inspection of Quality Products, supra,* 592 F.2d 611.

[19] *Marshall v. Central Mine Equipment Co., supra,* 608 F.2d 719.

[20] The First Circuit found that there would be no difference if the challenge to the warrant arose through a motion in district court to quash the warrant and suppress the evidence, as it did in *Quality Products,* or through an action for declaratory and injunctive relief, as in the cases at bar. *Quality Products, supra,* 592 F.2d at 615 n.5. We agree with this conclusion since the two types of actions are essentially the same.

the court found that Quality Products had an adequate legal remedy since the challenge to the warrant would be considered in the OSHA enforcement proceedings "if not by the Commission then by the Court of Appeals." Id. at 615 (citations omitted). In addition, the court found that policy considerations weighed against the exercise of equitable jurisdiction, since "[t]he practice of considering motions to suppress in proceedings separate from the proceedings at which the evidence would be used would afford much opportunity for abuse for dilatory purposes, to the detriment and possible disruption of effective law enforcement." Id. at 616. The court concluded that since there was another adequate remedy, since there had been no callous disregard for constitutional rights, and since no equitable remedy was needed to avoid irreparable injury, *Hunsucker* precluded the exercise of equitable jurisdiction.

The Eighth Circuit took a similar approach and reached a similar conclusion in *Central Mine, supra.* The court, citing *Hunsucker, supra,* and *Quality Products, supra,* noted that it agreed "with the First and Fifth Circuits that equitable jurisdiction should not be exercised unless the plaintiff 'clearly demonstrates that his constitutional rights cannot be adequately adjudicated in the pending or anticipated enforcement proceedings against him.' " *Central Mine, supra,* 608 F.2d at 721. Because the plaintiff had made no such showing, the court held that the exercise of equitable jurisdiction was improper. Moreover, the fact that the administrative proceeding before OSHRC had not yet been initiated did not require a different result, since the warrant had already been executed and the allegedly unconstitutional search had already been made.

> If the Secretary commences a statutory enforcement proceeding against Central Mine, Central Mine may then raise its challenge to the validity of the search under which the evidence was obtained. Even if the Commission will not consider this challenge, the Oc-

> cupational Safety and Health Act provides for appeal to a Court of Appeals which could consider the constitutional issue. We cannot say that these proceedings will not afford Central Mine an adequate remedy for any constitutional violation which may have occurred. On the other hand, if the Secretary elects or has elected not to bring an enforcement proceeding against Central Mine, we cannot hold that the plaintiff is suffering or will suffer from any irreparable harm that warrants the exercise of equitable jurisdiction.

Id. at 721-22. In other words, if administrative proceedings are brought, the company has an adequate remedy provided by the OSHRC review process, culminating in appeal to a federal circuit court; if proceedings are not brought, then declaring the search unconstitutional or suppressing its fruits is unnecessary and provides the company with no relief. Whether or not administrative proceedings have been initiated, district courts should refrain from exercising jurisdiction in cases like this one.[21]

Because Baldwin and Mosher have shown no irreparable injury, no callous disregard of constitutional rights and no necessity of equitable remedy at law, we hold that the district courts improperly exercised equitable jurisdiction in these cases. Although the procedural contexts of the *Central Mine and Quality Products* cases differ slightly from those in the cases at bar, the same equitable considerations that apply to motions to quash a warrant and to suppress the fruits of the subsequent

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[21] In light of the above analysis, it is unimportant whether or not administrative proceedings have already been initiated when an action concerning an administrative search is brought in federal court. Hence, Mosher's claim that its complaint was filed in district court before it received any OSHA citations, Brief for Appellee at 6, and appellants' observation that the OSHA citations were issued on the same day as Mosher's complaint was filed, Brief for the Secretary of Labor at 8-9, are irrelevant in deciding the Mosher case at bar.

search, should apply to actions for declaratory and injunctive relief seeking essentially the same result. The *Central Mine/Quality Products* analysis is therefore appropriate here, and the district courts should not have exercised their equitable jurisdiction in these cases.

V. The Final Destination[22]

Our less-than-scenic drive today has led us to conclude that the path proposed by the Seventh Circuit leads to a *cul de sac*, while the routes mapped out by the First, Third and Eighth Circuits provide a productive (if not pleasant) journey. We therefore have decided that the district courts in both cases at bar should have slammed on their brakes and refrained from exercising jurisdiction. Because they did not do so, we have had to take our turn in the driver's seat. Having driven far enough, we now give the wheel back to the district courts with adequate directions to complete the trip:

Both the doctrine of exhaustion of administrative remedies and the principles of equity jurisdiction preclude the exercise of jurisdiction in these cases. We therefore vacate the preliminary injunction granted in No. 79-2548 and the injunctive and declaratory relief granted in No. 79-2870. We remand both cases to the district courts with instructions to dismiss the actions brought by Baldwin Metals and Mosher Steel.

VACATED AND REMANDED.

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[22] Because we decide this case on jurisdictional grounds, we do not reach the other issues raised on appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MOSHER STEEL COMPANY, A
DIVISION OF TRINITY
INDUSTRIES

V. SA 78 CA 448

RAY MARSHALL, SECRETARY
OF LABOR, ET. AL.

ORDER

On this the 6th day of June, 1979, came on for consideration the various motions filed by the plaintiff and the defendants; and it appearing to the Court that it has jurisdiction to review the magistrate's action in issuing the inspection warrant involved on November 22, 1978; and it further appearing that said warrant was illegal in that it was issued *ex parte* at a time when the Secretary of Labor's regulations required that prior notice of the application for the warrant be given to the employer; and it further appearing that defendant's motions to dismiss should, in all respects, be denied, and that plaintiff's motions are meritorious and should be granted; it is, therefore,

ORDERED, ADJUDGED and DECREED as follows:

1. Defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and defendant's motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, are without merit and are, in all things, DENIED.

2. The request for inspection warrant and the inspection warrant issued against plaintiff are null and void, and are in violation of the provisions of the Occupational Safety and Health Act, 28 U.S.C. § 657;

3. Defendants are permanently enjoined from taking any further action against plaintiff based in whole or in part upon the complaint, warrant, or application for same;

4. Defendants are permanently enjoined from returning to the plaintiff's San Antonio facility and pursuing an inspection of plaintiff's premises based in whole or in part upon the complaint and/or warrant dated November 22, 1978;

5. The warrant issued by Magistrate Leonard on November 22, 1978, is hereby in all things quashed, and the defendants are hereby enjoined from refer ring, in whole or in part, to any evidence obtained as a result of the unlawful inspection of plaintiff's premises on the dates in question;

6. Defendant Occupational Safety and Health Review Commission, and defendant Department of Labor, are hereby enjoined from the issuance of any citations and/or proposed penalties as a result of the unlawful inspection of the plaintiff's premises;

7. Defendant Occupational Safety and Health Administration is hereby ordered to return to plaintiff all records, files, papers, documents, photographs and all other such material gathered by defendant during the illegal inspection of plaintiff's premises.

8. Defendant shall pay to plaintiff all costs of court; provided, however, the question concerning plaintiff's claim for attorney's fee will be held in abeyance, pending further order of the Court.

9. Except as otherwise indicated, all relief requested by any party that is not herein specifically granted or denied, is denied.

Entered this 6th day of June, 1979.

/S/ Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MOSHER STEEL COMPANY, A
DIVISION OF TRINITY
INDUSTRIES

V. CIVIL ACTION NO. SA78CA448

RAY MARSHALL, SECRETARY
OF LABOR, ET AL.

JUDGMENT

On this date came on for judgment the above cause, and it appearing to the Court that judgment pursuant to the order entered on June 6, 1979 should be rendered in favor of the plaintiff; it is, therefore,

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff, and that the plaintiff recover of the defendant its cost of the action, excluding attorneys' fees.

Entered this 6th day of August, 1979.

/S/ Adrian A. Spears
United States District Judge

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 79-2870

D. C. Docket No. SA-78-CA-448

MOSHER STEEL COMPANY, A DIVISION of Trinity Industries

Plaintiff-Appellee,

versus

RAYMOND J. DONOVAN, Secretary of Labor, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court with instructions in accordance with the opinion of this Court;

It is further ordered that plaintiff-Appellee pay to defendants-appellants the cost on appeal to be taxed by the Clerk of this Court.

April 13, 1981

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 79-2870

MOSHER STEEL COMPANY, A Division of Trinity Industries,

Plaintiff-Appellee,

versus

RAYMOND J. DONOVAN, Secretary of Labor, et al.,

Defendants-Appellants.

- - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - -

ON PETITION FOR REHEARING

(May 13, 1981)

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ HENRY A. POLITZ
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
SEP 15 1981
ALEXANDER L. STEVAS

No. 81-32

In the Supreme Court of the United States

OCTOBER TERM, 1980

MOSHER STEEL COMPANY, PETITIONER
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a suit brought to quash an inspection warrant issued under the Occupational Safety and Health Act of 1970 and to suppress evidence that was obtained during the execution of the warrant is moot following the Secretary of Labor's withdrawal of the citation issued as a result of the inspection.

2. Whether the district court should have declined to entertain a suit to quash an executed OSHA inspection warrant and to suppress evidence obtained during the inspection where judicial review of the validity of the warrant is available in the court of appeals as part of the Act's administrative enforcement process.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752 7

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535 7

Ashwander v. *TVA*, 297 U.S. 288 7

Atlas Roofing Co. v. *OSHRC*, 430 U.S. 442 3

Babcock & Wilcox Co. v. *Marshall*, 610 F. 2d 1128 ..... 5, 6, 7, 8, 10

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 5

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 6

County of Los Angeles v. *Davis*, 440 U.S. 625 5

First Jersey Securities, Inc. v. *Bergen*, 605 F. 2d 690 7

Fitzgerald v. *Hampton*, 467 F. 2d 755 7

Frank Irey, Jr., Inc. v. *Hodgson*, 354 F. Supp. 20, aff'd, 409 U.S. 1070 6

Page

Cases—Continued:

FTC v. *Standard Oil Co. of California*, No. 79-900 (Dec. 15, 1980) 5, 8

Greene v. *United States*, 376 U.S. 149 7

Hunsucker v. *Phinney*, 497 F. 2d 29, cert. denied, 420 U.S. 927 9

J.R. Simplot Co. v. *OSHA*, 640 F. 2d 1134 10

Linkletter v. *Walker*, 381 U.S. 618 10

Lord v. *Kelley*, 223 F. Supp. 684, appeal dismissed, 334 F. 2d 742, cert. denied, 379 U.S. 961 9

Marshall v. *Barlow's, Inc.*, 436 U.S. 307 ..... 2, 5, 8

Marshall v. *Central Mine Equipment Co.*, 608 F. 2d 719 ..... 7, 9, 10

McKart v. *United States*, 395 U.S. 185 5

McNeese v. *Board of Education*, 373 U.S. 668 7

Memphis Light, Gas & Water Division v. *Craft*, 436 U.S. 1 5

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 6

North Carolina v. *Rice*, 404 U.S. 244 5

Petroleum Exploration, Inc. v. *Public Service Comm'n*, 304 U.S. 209 8

Preiser v. *Newkirk*, 422 U.S. 395 5

Page

Cases—Continued:

Restland Memorial Park, In re, 540 F. 2d 626 ... 6

Roe v. *Wade*, 410 U.S. 113 5

Sabbath v. *United States*, 391 U.S. 585 8

See v. *City of Seattle*, 387 U.S. 541 8

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 5

Steffel v. *Thompson*, 415 U.S. 452 5

Stone v. *Powell*, 428 U.S. 465 10

United States v. *Calandra*, 414 U.S. 338 10

Weinberger v. *Salfi*, 422 U.S. 749 7

Weyerhaeuser Co. v. *Marshall*, 592 F. 2d 373 ..... 9, 10, 11

Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411 6

Worksite Inspection of Quality Products, Inc., In re, 592 F. 2d 611 ..... 6, 7, 9, 10-11

Statutes and regulation:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* :

29 U.S.C. 651(b)(3) 3
29 U.S.C. 654(a)(1) 2
29 U.S.C. 657(a) 2
29 U.S.C. 657(f) 2
29 U.S.C. 658(a) 2
29 U.S.C. 659(a) 2, 3
29 U.S.C. 659(c) 3

Page

Statutes and regulation—Continued:

29 U.S.C. 660(a) 3, 8
29 U.S.C. 661 3
29 U.S.C. 661(i) 3
18 U.S.C. 3109 8
28 U.S.C. 1254(1) 3
29 C.F.R. 2200.90 3

Miscellaneous:

45 Fed. Reg. 65916 (1980) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-32

MOSHER STEEL COMPANY, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 642 F. 2d 768. The order of the district court (Pet. App. 20a-22a) is unofficially reported at 1979 Occup. Safety & Health Dec. (CCH) para. 23,630.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1981. A petition for rehearing was denied on May 13, 1981 (Pet. App. 26a). The petition for a writ of certiorari was filed on July 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Mosher Steel Company fabricates structural and plate steel at its San Antonio, Texas, plant. On November 27, 1978, compliance officers of the Occupational Safety and Health Administration (OSHA) attempted to inspect petitioner's plant pursuant to an inspection

warrant based on both a general schedule of programmed inspections and employee complaints of unsafe conditions (R.E. 7-8; Pet. App. 5a).[1] They were refused entry (*ibid.*). Two days later the compliance officers returned, accompanied by a United States Marshal, and were permitted to enter, although petitioner's representatives objected to the inspection (*ibid.*). As a result of the inspection, the Secretary, on December 22, 1978, issued a citation charging petitioner with violations of the Act (*ibid.*).[2]

---

[1]The Secretary is authorized to conduct administrative inspections of workplaces by Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), which provides:

> In order to carry out the purposes of the Act, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

Pursuant to Section 8(f) of the Act, 29 U.S.C. 657(f), which is set forth at Pet. 2, the Secretary is also required to conduct administrative inspections in response to an employee complaint. This Court has previously examined the Secretary's authority to inspect worksites in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

"R.E." refers to the record excerpts in the court of appeals.

[2]The Act provides for an administrative enforcement process followed by judicial review. After inspecting a workplace, the Secretary is empowered under the Act to issue citations to an employer for violation of the Secretary's regulations or the Act's "general duty" clause (29 U.S.C. 654(a)(1)). The citation must specify safety and health violations and fix reasonable abatement times for the correction of these violations, and may propose penalties. 29 U.S.C. 657(a), 658(a), 659(a). Citations that are not contested by the employer within 15 working days

Also on December 22, 1978, petitioner filed this action for declaratory and injunctive relief in the United States District Court for the Western District of Texas, seeking to quash the warrant and suppress the evidence obtained in the course of the inspection (R.E. 2). Petitioner contended that the warrant was invalid on its face because the Secretary's regulations allegedly did not authorize the *ex parte* issuance of OSHA inspection warrants. The Secretary moved to dismiss the action, claiming that the district court lacked jurisdiction because petitioner had failed to exhaust its administrative remedies; the Secretary also argued that both the warrant and the inspection were lawful. Thereafter, on January 17, 1979, petitioner filed with the Secretary a notice of contest to the citations, thereby invoking the jurisdiction of the Occupational Safety and Health Review Commission (the Commission). See note 2, *supra*.

On June 6, 1979, the district court denied the Secretary's motion to dismiss the action and held that the warrant was unlawful because it was "issued *ex parte* at a time when the Secretary of Labor's regulations required that prior notice of the application for the warrant be given to the employer" (Pet. App. 20a).[3] The court accordingly quashed the warrant, permanently enjoined the Secretary from making any

---

become final. 29 U.S.C. 659(a). If the employer timely notifies the Secretary of his intention to contest a citation, he is afforded a hearing before an administrative law judge. 29 U.S.C. 659(c), 651(b)(3), 661. The judge's report becomes a final order of the Occupational Safety and Health Review Commission unless a Commissioner directs further review. 29 U.S.C. 661(i); 29 C.F.R. 2200.90. If the employer is not satisfied with the Commissioner's disposition of his claims, he may obtain review of the order in the court of appeals. 29 U.S.C. 660(a). The decision of the court of appeals is reviewable in this Court on writ of certiorari. 29 U.S.C. 660(a); 28 U.S.C. 1254(1). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-447 (1977).

[3]The Secretary subsequently amended his regulations to provide explicitly that he may obtain warrants *ex parte*. See 45 Fed. Reg. 65916 (1980).

use of evidence obtained during the inspection, permanently enjoined all administrative proceedings arising from the inspection, and ordered the Secretary to return to the company all materials gathered during the inspection (*id.* at 21a).

The court of appeals reversed (Pet. App. 1a-19a), holding that if an OSHA warrant has been executed, an employer must exhaust its administrative remedies in proceedings before the Commission prior to contesting the constitutionality of the warrant in judicial proceedings. The court reasoned that requiring exhaustion in such circumstances would avert disruption of the Act's administrative process and would avoid the need for judicial resolution of the constitutional questions if the Commission, for whatever reason, were to resolve the citation proceedings in the employer's favor (*id.* at 6a-9a). In addition, the court concluded that none of the exceptions to the exhaustion doctrine were applicable. It noted that the allegedly improper inspection did not amount to a "blatant" violation of petitioner's constitutional rights and that the availability of judicial review in the court of appeals of any Commission decision would prevent petitioner from suffering irreparable injury as a result of the exhaustion requirement (*id.* at 9a-14a).

As an alternative basis for its decision, the court of appeals held that the district court should have declined to exercise its equitable jurisdiction to entertain the suit, because this case satisfies none of the traditional criteria for the exercise of equitable jurisdiction: petitioner had an adequate remedy at law, there was thus no danger of irreparable injury, and there was also no evidence of a callous disregard for constitutional rights (Pet. App. 14a-19a).

ARGUMENT

1. This case is now moot. In the courts below, petitioner sought only declaratory and injunctive relief to bar the

Secretary from taking administrative action on the basis of evidence obtained during the challenged inspection.[4] On July 24, 1981, the Secretary withdrew the citation issued to petitioner as a result of the inspection, thus effectively granting petitioner all the relief it had sought.

There is accordingly no basis for further review, since there no longer exists " 'a real and substantial controversy admitting of specific relief.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). To avoid mootness, " 'an actual controversy must be extant at *all* stages of review, not merely at the time the complaint is filed.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974) (emphasis added). See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979). Thus, the prospect envisioned by the court of appeals in its ruling on the exhaustion of administrative remedies issue (see Pet. App. 7a-8a, 13a-14a, 18a) has come to pass: the termination of the administrative proceeding has mooted the need for judicial resolution of the constitutional questions arising from the issuance of the warrant. See *FTC* v. *Standard Oil Co. of California*, No. 79-900 (Dec. 15, 1980), slip op. 10; *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *Babcock & Wilcox Co.* v. *Marshall*, 610 F. 2d 1128, 1138 (3d Cir. 1979).[5]

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[4]Petitioner did not seek damages for the allegedly illegal inspection pursuant to this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Compare *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978) (holding that plaintiff's claim for damages prevented dismissal on mootness grounds).

[5]This case does not present an issue that is " 'capable of repetition, yet evading review.' " *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). To the contrary, in the three years since this Court's decision in *Marshall* v. *Barlow's, Inc., supra*, the exhaustion issue has been decided by six courts of appeals and is currently pending in two others. See pages 10-11, and note 9, *infra*.

2. In any event, the decision of the court of appeals is plainly correct and does not warrant review. The doctrine of exhaustion of administrative remedies is well established, both in the administrative context generally, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), and in the OSHA context in particular. *Frank Irey, Jr., Inc.* v. *Hodgson*, 354 F. Supp. 20 (N.D. W. Va.) (three-judge court), aff'd, 409 U.S. 1070 (1972); *In re Matter of Restland Memorial Park*, 540 F. 2d 626 (3d Cir. 1976). The court below correctly concluded (Pet. App. 7a) that two of the principal policies behind the doctrine would be served by requiring exhaustion here.

First, an exhaustion requirement protects the autonomy of agency proceedings. Where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Congress established the Occupational Safety and Health Review Commission as a central forum for adjudication of all citations issued by the Secretary for violation of the Act's safety and health requirements. In creating this enforcement mechanism, Congress struck a balance between the need for swift implementation of abatement orders and the provision of due process protections for affected employers. Interference with this scheme by employers seeking to invoke the powers of the district courts to quash executed warrants "might well sunder the statutory balance," *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1140, and "would afford much opportunity for abuse for dilatory purposes, to the detriment and possible disruption of effective law enforcement." *In re Worksite Inspection of Quality Products, Inc.*, 592 F. 2d 611, 616 (1st

Cir. 1979). Accordingly, exhaustion is "required as a matter of preventing premature interference with agency processes." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

Second, an exhaustion requirement offers the possibility, now realized in this case, of mooting the constitutional issue. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1954). As the court below recognized (Pet. App. 8a), an agency resolution favorable to the employer on the merits of the citation would make the relief sought by the employer redundant and would accordingly obviate the need for a judicial determination of the constitutionality of the warrant. See *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1138. Cf. *In re Worksite Inspection of Quality Products, Inc., supra*, 592 F. 2d at 616; *Marshall* v. *Central Mine Equipment Co.*, 608 F. 2d 719, 722 (8th Cir. 1979). This is consistent with the well-settled practice of avoiding constitutional adjudication whenever possible. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

Nor do any of the recognized exceptions to the exhaustion requirement apply here. Exhaustion is not required where there is no available administrative remedy, *Greene* v. *United States*, 376 U.S. 149, 163-164 (1964), where the available administrative remedy is inadequate to prevent irreparable harm, *McNeese* v. *Board of Education*, 373 U.S. 668, 674-676 (1963), or where blatant violations of constitutional or statutory rights have taken place. *First Jersey Securities, Inc.* v. *Bergen*, 605 F. 2d 690, 696 (3d Cir. 1979); *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 768 (D.C. Cir. 1972). Here, however, it is clear that the administrative remedy is adequate. Requiring exhaustion will not irreparably injure the employer, because the alleged constitutional violation has already occurred, and because the employer

may obtain complete relief on his constitutional claims in the court of appeals. 29 U.S.C. 660(a).[6] Moreover, the expense of administrative litigation alone does not constitute irreparable harm. *FTC* v. *Standard Oil Co. of California, supra*, slip op. 11; *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 220-222 (1938). Finally, the court of appeals noted (Pet. App. 14a) that the record contains "no evidence of a callous disregard by OSHA officials for the constitutional rights of the compan[y]."[7] For these reasons, the court of appeals correctly held that petitioner was required to exhaust its administrative remedies.

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[6]The availability of judicial review in the court of appeals also defeats the contention that an exhaustion requirement violates the constitutional doctrine of separation of powers. Under the Act, the question "is not *whether* the issues may be heard by an Article III court, but *when*." *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1136 (emphasis in original; footnote omitted).

[7]In suppressing the evidence obtained as a result of the inspection, the district court found only that the Secretary had violated his own regulations in obtaining the warrant *ex parte* (Pet. App. 20a). There is, of course, no constitutional prohibition on the issuance of *ex parte* search warrants. See *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 320.

The inspection in this case was conducted in furtherance of the Secretary's responsibility for insuring the health and safety of employees in the nation's workplaces and pursuant to a warrant obtained in good faith from the appropriate judicial officer. Petitioner claims (Pet. 5-6) that force was used to gain entry to its plant in that a United States Marshal pushed aside a company representative at the door. The record contains no finding, by either the district court or the court of appeals, regarding the alleged use of force by the marshal, and petitioner does not claim that any OSHA inspector used force in entering the plant. In any event, the fact that the marshal may have used force in executing the warrant does not reflect a "callous disregard" for constitutional rights. It is settled that in executing a search warrant, law enforcement officers may make a forcible entry into the premises after giving notice of their authority and being refused entry. 18 U.S.C. 3109. See *Sabbath* v. *United States*, 391 U.S. 585 (1968). The same rule is generally applicable in the administrative search context. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967).

The court below was also correct in holding (Pet. App. 14a), as have two other courts of appeals in similar cases, that the district court should in any event have declined to exercise its equitable jurisdiction to entertain the suit. See *Marshall* v. *Central Mine Equipment Co., supra; In re Worksite Inspection of Quality Products, Inc., supra.* A district court's power to consider the admissibility of evidence in a separate proceeding is exceptional in nature; it has been termed the "anomalous" jurisdiction (*Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F. 2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965)), and its exercise is subject to equitable restraints. *Hunsucker* v. *Phinney*, 497 F. 2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Thus, as the court of appeals held, a district court should decline to exercise its jurisdiction in the absence of the danger of irreparable injury, the possibility of an inadequate remedy at law, or the existence of a callous disregard for constitutional rights. As discussed above (see pages 7-8, *supra*), none of these prerequisites is met in this case.

3. Petitioner correctly notes (Pet. 11) that the decision below is contrary to the Seventh Circuit's decision in *Weyerhaeuser Co.* v. *Marshall*, 592 F. 2d 373 (1979), but that conflict does not, in our view, provide a sufficient basis for review by this Court. As the court below correctly observed (Pet. App. 7a-8a), the Seventh Circuit in *Weyerhaeuser* plainly erred in concluding that an administrative decision in favor of the employer would not moot the issue of the constitutionality of the warrant. In reaching that conclusion, the Seventh Circuit purported to distinguish between the injury resulting from the citation and the injury resulting from the inspection itself, and held that while a Commission ruling in favor of the employer would relieve the former, it could not moot the latter.

But the relief sought in this case, like that sought in *Weyerhaeuser*, is directed at foreclosing any administrative action based on the fruits of the inspection. The Fourth Amendment injury caused by an unconstitutional inspection is fully accomplished by the inspection itself and can never be repaired. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Hence, as the court below noted (Pet. App. 7a-8a), while there is indeed a distinction between the injury resulting from the inspection and the injury resulting from the citation, the declaratory and injunctive relief sought in cases like the one at bar concerns solely the latter, and any constitutional issue arising from the use of the fruits of the inspection to support the citation is therefore rendered moot by dismissal of the administrative proceedings.[8]

We note that *Weyerhaeuser* was the first court of appeals decision on the question whether a district court is the proper initial forum to review the validity of an executed OSHA inspection warrant. Since the Seventh Circuit's decision in *Weyerhaeuser*, five other courts of appeals, including the Fifth Circuit in this case, have considered the question. Without exception, these courts have rejected the Seventh Circuit's analysis. See *J.R. Simplot Co.* v. *OSHA*, 640 F. 2d 1134 (9th Cir. 1981); *Babcock & Wilcox Co.* v. *Marshall, supra; Marshall* v. *Central Mine Equipment Co., supra; In re Worksite Inspection of Quality Products,*

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[8]The decision in *Weyerhaeuser* was based in part on the Seventh Circuit's belief that no benefit would be derived from requiring exhaustion because the Commission would not rule on the validity of an inspection warrant. 592 F. 2d at 376-377. Since *Weyerhaeuser* was decided, the Commission has in fact passed on constitutional questions relating to the use of evidence obtained pursuant to allegedly invalid warrants (see Pet. App. 11a n.11). Regardless of whether the Commission is authorized to decide these questions, the availability of judicial review prevents the employer from being irreparably injured as a result of being required to exhaust its administrative remedies.

Inc., supra.[9] In light of the uniform subsequent authority rejecting the Seventh Circuit's position, the Secretary intends to request that court to overrule its *Weyerhaeuser* decision.[10] There will be time enough for this Court to consider the issue if the Seventh Circuit declines to overrule *Weyerhaeuser*, or if another court of appeals adopts the Seventh Circuit's position.

---

[9]The exhaustion issue is also currently pending in two other circuits. *United States* v. *Cleveland Electric Illuminating*, No. 81-3159 (6th Cir.); *B.B. Anderson Construction Co.* v. *Donovan*, No. 81-1742 (10th Cir.).

[10]The issue is currently pending before the Seventh Circuit in *Federal Casting Co., Chromalloy American Div.* v. *Donovan*, Nos. 81-2026, 81-2103.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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No. 81-32

IN THE

Supreme Court of the United States

October Term, 1980

Mosher Steel Company, Petitioner,

V.

Raymond J. Donovan, Secretary of Labor, Et Al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The only matter that requires further discussion is the Secretary's suggestion that this case is moot, which he relies on both as a reason in itself for denying certiorari (pp. 4-5) and as a basis for distinguishing the Seventh Circuit's decision in the *Weyerhaeuser* case (p. 10).

The question of mootness was not discussed in our original Petition for the best of all possible reasons. The Petition was filed on July 7, 1981. It was not until July 24th, the Brief in Opposition advises the Court, that the Secretary withdrew the citation (p. 5).

Although the Secretary's tactic was not unforeseen by petitioner (Pet., p. 12 n. 11), surely this Court will not allow it to prevail. The Secretary persuaded the Fifth Circuit to deny judicial review by asserting that petitioner had an adequate administrative remedy, with review in the courts available after the agency had ruled. 642 F.2d at 773. Even now the Secretary undertakes to defend the correctness of the decision below by saying that this is not a case in which there is no available administrative remedy (p. 7). But now, confronted by an opponent with the tenacity and the money to seek review here, the Secretary dismisses the citation and asserts that by doing so he can avoid either administrative or judicial review. This is what "the late Francis H. Bohlen would call 'carrying a good joke too far.' " *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

But the Fourth Amendment is no laughing matter and this case is no joke. OSHA inspectors come out with an invalid warrant, achieve entry by force, and for three days carry on an extensive search "to make an example" of petitioner (Pet., pp. 4-6). When they find they have taken on an opponent who will not roll over and play dead, government officials seek by skillful timing to avoid any

review, either judicial or administrative, of what their people have done.

The doctrines of mootness have more than their share of complexities and uncertainties, but there is nothing in them that suggests that judicial review of important issues can be defeated by so cynical and transparent a tactic. E.g., *Quern v. Mandley*, 436 U.S. 725, 733 n. 7 (1978); *S.E.C. v. Sloan*, 436 U.S. 103, 108-110 (1978); *Dow Chemical Co. v. United States Environmental Protection Agency*, 605 F.2d 673, 677-680 (3d Cir. 1979); *Nader v. Volpe*, 475 F.2d 916 (D.C.Cir. 1973); 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533, at pp. 282-291 (1975).

The writ of certiorari should be granted and the parties directed to brief and argue the question of mootness as well as the substantive questions presented by the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to all Counsel of Record the 29th day of September, 1981.

Robert E. Rader, Jr.